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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AB CELLULAR–LA, LLC, et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B159805 (Super. Ct. No. BC 257225)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory O'Brien, Judge. Reversed and remanded with directions.

Keker & Van Nest, Steven A. Hirsch and Julia M. Fromholz for Plaintiffs and Appellants.

Rockard J. Delgadillo, City Attorney, and Valentin Dinu, Deputy City Attorney, for Defendant and Respondent.

AB Cellular-LA, LLC and its related predecessors (Cellular) appeal from the judgment dismissing their promissory estoppel and unreasonable tax collection case against the City of Los Angeles. The court entered the judgment after sustaining the City's demurrer to the first amended complaint without leave to amend.

Cellular alleged it could not accurately collect a City tax on cellular telephone customers with billing addresses in the City where the customers used billing addresses that gave a city other than "Los Angeles," such as "Culver City" or "Sylmar," where the listed address may or may not be in the City. Cellular alleged the City promised to provide a computer data base, compatible with Cellular's computer billing system, which would tell Cellular whether the customer's billing address was in the City, but failed to do so despite several attempts. Cellular alleged it relied on that promise, and did not bill such customers for the tax. Cellular alleged the City nonetheless then billed Cellular for the amount of taxes a City audit estimated Cellular should have collected from those customers, plus interest and penalties. Cellular alleged it paid the amount demanded under protest, exhausted its administrative remedies, and then filed this suit, seeking reimbursement for those amounts.

(I) Cellular contends the trial court erred in sustaining the City's demurrer without leave because it sufficiently pled promissory estoppel and unreasonable tax collection as a matter of law, and the court improperly relied on Cellular's perceived inability to prove its allegations. Cellular argues the trial court ignored facts Cellular pled, assumed contrary unpled facts, and resolved perceived factual disputes against Cellular. (II)

Cellular also contends it could allege sufficient facts to overcome the demurrer if given a chance to amend, and the court abused its discretion in denying Cellular that opportunity.

We agree with Cellular's first contention, reverse the judgment, and remand for the trial court to enter a new order overruling the City's demurrer. Because of our conclusion, we need not consider Cellular's second contention. Likewise, we reject the City's unsupported request for attorney fees.

FACTS

On December 5, 2001, the trial court sustained the City's demurrer to Cellular's original complaint, filed August 31, 2001, with leave to amend. Cellular filed the first amended complaint, the operative pleading (hereafter, complaint), on January 4, 2002. All the following facts are from the complaint and its attachments.

Cellular alleged that on December 31, 1994, it had 578,870 retail customers, and added tens of thousands of customers annually, until by December 31, 2000, it had 1,311,858 customers. Cellular also alleged the City had a 10% telephone users tax, which it amended on August 9, 1993, to "'includ[e] . . . services for mobile cellular telephone communication when the owner or lessee of the telephone has a billing address in the City.'" Cellular further alleged the City assessed the tax regardless of the source or ending of the telephone calls, and required the cellular service provider to collect the tax as far as practicable with regularly billed services.

Cellular's primary allegations are contained in paragraphs 12-16: "12. Numerous customers of [Cellular] live within the geographic area that constitutes the City, but have

and use addresses which include a community name other than 'Los Angeles.' There are approximately 50 community names other than "Los Angeles' (such as, for example, Beverly Hills or Culver City) which are used by customers who reside within the geographic area that constitutes the City. Such customers use a community name other than 'Los Angeles' as part of their address when they provide [Cellular] with address information in the course of obtaining cellular telephone services.

"13. . . . [Cellular] utilized a computer-based system to input and store customer address data and to generate monthly invoices, which invoices included applicable federal, state and local taxes. . . . [T]he City knew that [Cellular] utilized such a computer-based billing system and that [Cellular] required the input of computer-compatible information identifying street address ranges (including community names other than 'Los Angeles' used by customers when they obtained cellular telephone service) in order to correctly collect from its customers the taxes that are the subject of this action. . . . [T]he City knew that [Cellular] depended on and required the City to supply such complete street address ranges information in order to collect from [Cellular]'s customers the tax at issue herein.

"14. The law imposes a duty upon the City to use only reasonable means to effect the collection of the telephone users tax. . . . [T]he City took various of the actions alleged below . . . in recognition of and/or attempted satisfaction of that duty. . . . [T]he City knew that its failure to provide computer-compatible information to [Cellular] in the form described in Paragraph 13 above for use in connection with [Cellular]'s computer-

based billing system would render any collection burden imposed on [Cellular] with respect to the telephone users tax unreasonable and unlawful, causing the collection means imposed in connection with the [tax] Ordinance to be unreasonable and unlawful.

"15. On June 14, 1993, during the time the [tax] Ordinance was under consideration by the Los Angeles City Council, the Los Angeles City Attorney communicated in writing with the Los Angeles City Council and at that time forwarded to the City Council (i) a draft of the ordinance amending the telephone users tax to apply to mobile cellular telephone communication and (ii) a draft of a Notice the City Clerk planned to send to cellular telephone companies. The draft notice to cellular telephone companies stated . . . that '[t]he city will be required to furnish a file of in[-]city street names, addresses and zip plus four [to the cellular telephone companies].'. . . [T]he City Attorney prepared and sent the draft Notice to the City Council to inform the City Council of how the City intended to satisfy its legal duty to impose only a reasonable means to effect collection of the tax by cellular telephone companies such as [Cellular].

"16. In connection with the adoption of the [tax] Ordinance, cellular telephone companies including [Cellular] received from the City a formal Notice to Suppliers of Telephone Services (the 'Notice') stating . . . that '[t]he city will be required to furnish a file of in[-]city street names, address and zip plus four [to the cellular telephone companies].'. . . [T]he City intended the Notice sent to [Cellular] to constitute a representation, promise and commitment to [Cellular] to provide [Cellular] with computer-compatible address information, including community names as used by

[Cellular]'s customers, so that [Cellular] would be able to collect the telephone users tax." (Emphasis added.)

Cellular attached and incorporated a copy of the Notice to the complaint. The Notice stated: "The City . . . has enacted an amendment to [the] . . . Telephone Users Tax[]which expands the telephone service which will be subject to the tax. It specifically includes mobile cellular telephone communications. The tax will now be applicable on all the charges for this type of telephone service associated with an in[-]city billing address.

"Certain cellular telephone industry representatives have stated that their billing systems are capable of applying the tax to only the monthly charges as identified with an in[-]city billing address. The City will be required to furnish a file of in[-]city street names, addresses and zip plus four.

"Additionally, they have said that they will be prepared to collect the tax with an ordinance effective date of August 1, 1993 if the City accepts a tax calculated only on the monthly charges. With the short time frame provided, and because we have no reason to dispute their position, the City will accept at this time that the tax will be calculated and remitted on the monthly charges.

"However, the City expects that in the near future (1994) . . . the tax base will be expanded to also include all telephone calls received and/or terminated in the City of Los Angeles and to that end we look forward to working with the industry." (Emphasis added.)

Cellular alleged the "City recognized its need to send the computerized address information in at least three different formats to different cellular telephone companies to accommodate their differing computerized billing systems. The format that the City recognized and acknowledged was needed for [Cellular] was an 'Address range file' that include[d] the 'USPS community name.'. . . [T]he term 'community name' as used by the City, the United States Postal Service and [Cellular]'s customers refer[s] to the names of communities other than 'Los Angeles' which are located at least partially within the geographic boundaries of the City."

Cellular alleged the City knew Cellular could not accurately collect the tax until the City provided the required data in a format compatible with Cellular's computerized billing system. Cellular alleged the City made several attempts to provide the data on computer tapes, the first being in July 1993, before the tax' effective date. However, every tape failed to provide the data in a compatible format. The City knew each effort had failed, and it continued to make later efforts to try and comply with its promise to provide the data in a compatible format.

Cellular pleaded the repeated failures of the City-supplied computer tapes: "After receiving the City tape, [Cellular] discovered that some of the address information contained in the City tape was incomplete and incorrect and failed to fulfill the City's representation, promise and commitment because it failed to contain the community names used by many of [Cellular]'s customers. Such information was rejected by [Cellular]'s computerized billing system. The community name was identified as 'Los

Angeles' in all cases even though in many cases this identification was improper and incorrect because both the customer and the United States Postal Service used a community name other than 'Los Angeles.'"

Cellular alleged that it properly collected the tax for all its customers who used a "Los Angeles" community name, but was unable to do so for customers who used any other community name, even if the billing address actually was within the City.

Cellular alleged that, after the City provided the first incompatible and incorrect tape in July 1993, the City repeatedly provided additional computer tapes, attempting to comply with its promise to do so. The City provided a new tape in March 1994, and a third tape in the last quarter of 1998. According to the complaint, the City knew that all these tapes failed to provide accurate, complete, and computer-compatible data to Cellular. Cellular also alleged it repeatedly asked for such tapes, and communicated with City officials, from 1993-2000, but the City never provided the promised information.

Cellular alleged it employed many people to attract additional customers, and that it "was not practical or reasonably possible" for Cellular to manually determine whether addresses with community names other than "Los Angeles" were within the City. Cellular had no feasible alternatives to using its computerized billing programs, and reasonably expected the City to provide accurate, complete, and computer-compatible tapes to allow Cellular to do so.

Cellular also alleged that some other cities in its four-county area had different cellular telephone taxes, while other cities had no such tax. Cellular used its

computerized billing system to determine what, if any, such tax applied to each customer, and assess and collect the correct tax. Assessing or collecting the wrong tax would expose Cellular to liability from customer lawsuits.

Cellular alleged the City audited it for the period from September 1, 1995, through December 31, 1998. The City conducted the audit by sampling one of Cellular's 17 different monthly billing cycles for the month of October 1997. "The auditor manually reviewed approximately 6,500 billing records from that one billing cycle. In order to determine the actual city of residence for each customer reviewed, the auditor checked the customer's address in a Thomas Guide street directory for Los Angeles County. The review process was performed by the auditor during a four month period."

The complaint alleged that, as a result of the audit, the City assessed Cellular $5,028,570.34 in estimated tax, $3,114,635.40 in interest, and a $60,817.67 penalty, totaling $8,204,023.41. Cellular paid the total, filed a timely refund request, and, after the City rejected the request, timely filed this case.

Cellular then pled a cause of action for a refund of the full amount of the tax and interest it paid the City. Cellular alleged five grounds for the refund: "A. The City is estopped from attempting to recover the tax from [Cellular] for customers whose address information was incorrectly specified by the City; [¶] B. The City's collection of the tax at issue from [Cellular] constitutes imposition of an illegal, unreasonable and burdensome tax collection requirement on [Cellular]; [¶] C. [Cellular] is excused from the collection of the tax at issue in this case because of the actions of the City on whose behalf

[Cellular] collects the tax at issue; [¶] D. The ordinance requires [Cellular] to collect the tax at issue 'insofar as practical'; and under the circumstances of this case, it was and is not practical for [Cellular] to collect the taxes at issue, and therefore there was no requirement under the ordinance for [Cellular] to collect such taxes; [¶] E. For each of the reasons stated above, it is unreasonable and illegal for the City to deem the tax which is the subject of this Claim for Refund to have been paid to [Cellular] by its customers and to seek payment from [Cellular] of any such 'deemed' paid tax, when no such tax was in fact billed or accrued by, or paid to, [Cellular]."

Cellular elaborated on its estoppel theory in paragraphs 48-52. Paragraph 48 stated: "At the time of the enactment of the Ordinance, the City represented, promised and committed in its Notice sent to [Cellular] that the City would be 'required' to furnish [Cellular] a file containing the addresses of persons living within the City who may be subject to the telephone users tax. [Cellular] . . . alleges that . . . the City knew and understood that the file it was required to furnish [Cellular] had to be computerized and compatible with [Cellular]'s computerized billing system, and had to contain address information consistent with the information supplied by [Cellular]'s customers at the time they obtained cellular telephone service, including the various community names used by [Cellular]'s customers. [Cellular] reasonably understood the City's statements in the Notice to [Cellular] to be a representation, promise and commitment to provide a file that met these requirements. The City further recognized and knew that the format needed by [Cellular] to bill and collect the City telephone users tax included the United States Postal

Service 'community name,' which in many cases was a name other than 'Los Angeles.' . . . [T]he City intended that its representations, promises and conduct be acted upon by [Cellular]. Based on the City's representations, promises and conduct, [Cellular] had the right to believe that the City intended [Cellular] to rely on the City's representations, promises and conduct." (Emphasis added.)

Paragraph 49 stated: ". . . [T]he City promised to provide the required file of information to fulfill its legal duty to impose only a reasonable collection burden on [Cellular]. The City at no time informed [Cellular] that the City was rescinding or refusing to honor its promises, or that the City was purporting to require [Cellular] to create its own file of correct address information for customers residing within the geographic boundaries of Los Angeles." Cellular claimed it never knew of any such intent by the City.

In Paragraph 50, Cellular alleged all the tapes it received from the City were incomplete and incorrect because they "misidentified the community name included as part of the address used by a large number of [Cellular]'s customers." Cellular told the City that all the tapes were wrong. "Despite the City's commitment to provide a corrected tape, the City failed to do so."

Paragraph 51 stated: "[Cellular] justifiably relied to its detriment on the City's representations, promises and commitments that [the City] was 'required' to provide and would provide a file of address data that could be used with [Cellular]'s billing system to bill and collect the City's telephone users tax. In reliance on the City's representations,

promises and commitments, [Cellular] collected the City's telephone users tax from those customers who provided addresses containing the community name 'Los Angeles,' and did not collect and was unable to collect the tax from customers whose addresses contained a community name other than 'Los Angeles.' Many of [Cellular]'s customers during the 1995-1998 audit period are no longer customers. It is not practical or reasonably possible for [Cellular] to 'back bill' persons who were customers during the 1995-1998 audit period for these taxes and then to enforce collection of any such bills for taxes. Moreover, California Public Utilities Commission Decision No. 86-12-025 does not permit such back billing." Paragraph 52 then concluded that the City was estopped from retroactively requiring Cellular to identify customers for the audit period who were subject to but had not been billed for the tax, recovering the tax from Cellular, or deeming the tax to have been collected.

In paragraphs 53-56, Cellular elaborated on its unreasonable and illegal collection burden theory. Cellular alleged it was unreasonable and impractical for it to manually generate the required information without the City providing the promised data. Cellular also alleged it constituted an unreasonable collection burden for the City to promise such information, not provide it, and then retroactively assess Cellular for the tax.

Cellular also alleged the City's acts excused it from any obligation to collect the tax, which was owed by the customers, not Cellular. Cellular also alleged the City's conduct made it legally impractical to collect the tax.

The City demurred. After briefing, the parties argued the demurrer at an April 10, 2002, hearing. The trial court prepared a preliminary or tentative ruling, which the parties received and read before the argument. The final ruling, which the court adopted from the tentative ruling without substantive change, stated: "First cause of action (refund): Sustained, without leave to amend. [Cellular]'s contentions – that (A) the city is estopped, (B) the tax is unreasonable and burdensome, (C) [Cellular] is excused from collecting tax, (D) that the city's ordinance was impractical, and (E) that it is unreasonable and illegal for the city to deem that [Cellular] collected the tax owed – are unsupported by the facts or law.

"First, the court will take judicial notice that Beverly Hills and Culver City are separate, incorporated cities. Judicial notice also is taken that the referenced 'community names' are districts within the city proper, e.g., Studio City, North Hollywood, Van Nuys, Sherman Oaks, Toluca Lake, Woodland Hills, Pacoima, Northridge, etc. The court will further take judicial notice that such districts each have zip codes, and that the Thomas Guide publishes a zip code directory.

"The fact that the city may have attempted to provide a tape that [Cellular] determined was unsatisfactory for its billing needs did not relieve [Cellular] of its burden to collect the tax, nor did it obligate the city to provide [Cellular] with further technical assistance. The 'Notice to Suppliers of Telephone Services' merely indicated that the city would furnish city street names and zip codes plus four. It did not indicate that the city would substitute the common district or community names for 'Los Angeles.'"

During argument, the court said: "[T]here are 50 communities or community names within the City of Los Angeles. I don't doubt it. The San Fernando Valley, from Tarzana and Encino on the West through Shadow Hills and Woodland Hills and Northridge and Sherman Oaks, Studio City, North Hollywood, Pacoima, Sepulveda, et cetera, all those communities are entirely within the City of Los Angeles. So that if [Cellular] is sending a bill to somebody in Sherman Oaks, it knows by virtue thereof, or should know, that the bill is going to somebody who lives within the City of Los Angeles. There just cannot be any mistake about it.

"Same thing with San Pedro, same thing with Hancock Park. You send something to West L.A., you can send it to Los Angeles 90049 or you can sen[d] it to West Los Angeles 90049. West Los Angeles is part of Los Angeles. A piece of mail will get to UCLA or wherever it is you happen to be sending or directing the piece of correspondence. And it seems what [Cellular] has done . . . is taken the position that since some people living on the borders of, say, Beverly Hills but nevertheless, within the City of Los Angeles, use a Beverly Hills postal address, that it's uncertain . . . whether that person actually lives within the city proper of Beverly Hills or within the City of Los Angeles."

Later, the court continued: "If you live in a county area near West Hollywood, you may have a West Hollywood address, but nevertheless, you don't live in the city proper of West Hollywood. You may live in the county strip right next to West Hollywood.

"What I don't understand is why [Cellular] apparently decided that since certain minor anomalies that arguably exist around the borders of a few island incorporated cities, such as Culver City, that [Cellular] . . . has the right not to bill people who use community names rather than the City of Los Angeles. Meaning all 50 community names, meaning that [Cellular] apparently does not bill a customer . . . in the district of Sherman Oaks because your client purportedly doesn't know, gosh, is Sherman Oaks in the City of Los Angeles, when anybody who has lived here or anybody who is able to open up a zip code directory or a Thomas Guide knows with certainty that, yes, Sherman Oaks is in the City of Los Angeles."

Later, the following colloquy occurred: "The Court: [Cellular] can't claim with a straight face . . . to have been so handicapped as to not know where to send these bills because it didn't have a software package that converted the name Studio City to City of Los Angeles. [Cellular] knows.

"[Cellular's counsel]: . . . [I]t is not an issue of knowing where to send the bills. It is an issue of what is the proper taxing jurisdiction to assign. That is done through a computer program that needs this information.

"The Court: . . . [A]ll [Cellular]'s billing room needed to do was to take a look at the 50 community names that you have discussed in your pleadings and say . . . we know that Universal City, that Hancock Park, that San Pedro are within the City of Los Angeles. And, therefore, we will just note that if we have a customer in San Pedro or

Hancock Park or Universal City or whatever, that that in fact is in the City of Los Angeles. We don't need the City's help to figure that out.

"That leaves you with [] just a small handful of arguable anomalies on the periphery of some of the incorporated cities, island cities such as West Hollywood. But . . . from your complaint . . . [Cellular] used the excuse of the lack of a software program that converted community names to 'City of Los Angeles' or 'City of Los Angeles' to community names as a reason not to bill all these customers in communities that any idiot knows lie within, totally within, the City of Los Angeles."

Finally, the court concluded: "I don't see an estoppel. It appears the City attempted to assist [Cellular] with the software package. [Cellular] w[as]n't satisfied by the software package. And, therefore, [Cellular] elected not to use any help and bill people in 50 communities that every resident of Los Angeles, anybody who lives here, knows lie entirely within the City of Los Angeles. And to seek to claim an estoppel for that, that's just outrageous on the part of [Cellular]."

Later, the court entered judgment dismissing Cellular's case. Cellular appealed.

DISCUSSION

Cellular contends the court erred in sustaining the City's demurrer without leave to amend. Cellular argues it sufficiently pled both its promissory estoppel and unreasonable tax collection burden theories as a matter of law. Cellular notes the City relies on equitable estoppel principles and cases to support its position, a different and irrelevant legal theory than what Cellular pled. Cellular also argues the trial court erred in ignoring

pled facts, assuming contrary facts, and resolving perceived factual disputes against Cellular, all improper when ruling on a demurrer. We agree.

"The function of a demurrer is to test the sufficiency of the complaint by raising questions of law. [Citation.] The complaint must be given a reasonable interpretation and read as a whole with its parts considered in their context. [Citation.] A general demurrer admits the truth of all material factual allegations of the complaint; plaintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court. [Citation.] 'As a reviewing court we are not bound by the construction placed by the trial court on the pleadings but must make our own independent judgment thereon, even as to matters not expressly ruled upon by the trial court.' [Citation.]" (*Aragon-Haas* v. *Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 238-239; *Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318.)

"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.] . . . . When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable

possibility is squarely on the plaintiff. [Citation.]" (*Blank* v. *Kirwan*, *supra*, 39 Cal.3d at p. 318.)

"In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.' [Citations.] Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.)

"In its usual application, estoppel is based upon a representation of fact which the party is not permitted to deny. [Citation.] The doctrine of *promissory estoppel* is distinct, and applies even though there is no misrepresentation: One who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration; i.e., the estoppel is a substitute for consideration.

"The Restatement (§ 90(1)) states the doctrine as follows:

"'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

"Comment b points out that the promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. . . .

"The doctrine has been applied in many California cases. [Citations.]" (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 248, pp. 249-250.)

Promissory estoppel's elements are (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages, "measured by the extent of the obligation assumed and not performed. [Citations.]" (1 Witkin, Summary of Cal. Law, *supra*, Contracts, §§ 249-250, p. 251.)

Although discussing equitable rather than promissory estoppel, cases have held that estoppel, not usually available against the state in tax cases, can apply in actions for recovery of taxes paid, particularly against non-state governmental taxing agencies such as the City. (*People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 553-555.)

A city has the power to impose utility users taxes, and may use "reasonable means" to collect them. (*City of Modesto v. Modesto Irrigation Dist.* (1973) 34 Cal.App.3d 504, 508.) However, the City cannot do so in a way which is "arbitrary and not essential to a reasonable exercise of the city's constitutional power to tax for revenue purposes.[]" (*Id*. at p. 509.)

The parties do not dispute any of the governing legal principles discussed above.

Here, Cellular pled that the City promised to provide computerized data that was compatible with Cellular's computerized billing program that would convert community

names into the actual city in which the customer lived. Cellular alleged it could not produce such information by itself and the City knew so. Cellular alleged it relied on the City's promise to produce that information, without which Cellular could not accurately bill or collect the tax. Cellular alleged it collected the tax from its customers who used a "Los Angeles" billing address, showing compliance with its collection obligation to the extent possible. Cellular alleged it relied to its detriment when the City failed to provide the promised information in the promised format. Finally, Cellular was damaged by being forced to pay the tax and interest which it could not accurately previously collect.

Moreover, Cellular pled detailed facts, not mere conclusions. Cellular already had tens of thousands of affected customers when the tax became effective. The trial court's comment focused only how new customers could be categorized, and ignored the tremendous burden accurately assessing current customers in August 1993 would have been. Cellular pled it took the City four months to audit only 6,500 customers from one of 17 monthly billing cycles for a single month. This allegation supports the claim that it was impossible for Cellular to accurately and reasonably do so without the promised data.

Thus, Cellular sufficiently pled both its theories as a matter of law.

Further, the trial court's assumptions that only a few of the community names were not completely within the City is a factual assertion which cannot trump Cellular's pleadings. The trial court expressly engaged in fact finding and factual conflict resolution in its decision. Doing so is improper in ruling on a demurrer.

We conclude the trial court erred in sustaining the demurrer without leave.

DISPOSITION

We reverse the judgment and remand the case for the trial court to enter a new order overruling the demurrer and directing the City to answer. Cellular is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.